

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5474

51

**MURPHY & AMES, INC., A CORPORATION,
APPELLANT,**

vs.

HUGO HERFURTH, JR.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

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Court of Appeals of the District of Columbia

No. 5474.

MURPHY & AMES, INC., a Corporation,
vs.

HUGO HERFURTH, JR.

a Supreme Court of the District of Columbia.

At Law.

No. 76093.

HUGO HERFURTH, JR., Plaintiff,
vs.

MURPHY & AMES, INC., a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Declaration.

Filed November 16, 1928.

In the Supreme Court of the District of Columbia.

At Law.

No. 76093.

HUGO HERFURTH, JR., Plaintiff,
vs.

MURPHY & AMES, INC., a Corporation, Defendant.

I. The plaintiff sues the defendant for that heretofore, to wit, on the 4th day of January, 1928, and for sometime prior thereto and at all times thereafter the defendant was

and still is a corporation organized and existing under and by virtue of the laws of Virginia, and having its principal place of business in Rosslyn, in the State of Virginia, and engaging regularly in business in the District of Columbia; and that the plaintiff was and still is a general contractor engaged in business in the District of Columbia; that on, to wit, January 4, 1928, the plaintiff, as was well known to the defendant, was contemplating making a bid for the construction of a Parish House for St. Paul's Episcopal Church in the District of Columbia; that on said date the defendant made a written offer to the plaintiff to furnish and deliver to the plaintiff in the District of Columbia the mill work and columns for the said Parish House of St. Paul's Church, except the folding partitions, as required by the plans and specifications for said Parish House then or theretofore in the possession of the defendant at and for the total price of Forty-nine Hundred Thirty Dollars (\$4930); that at the time the defendant made said offer to the plaintiff, the defendant knew, or should reasonably

have known, that the plaintiff might use said offer
2 in connection with the bid which plaintiff was contemplating making for the construction of said Parish House; that the plaintiff did use said offer in arriving at the figure on which he bid for said construction of said Parish House and did make a bid for said construction, and on, to wit, January 11, 1928, the plaintiff was awarded the contract for the construction of said Parish House for the St. Paul's Episcopal Church, according to plans and specifications aforementioned, which plans and specifications had been in the possession of the defendant as well as the plaintiff; that thereafter on, to wit, January 12, 1928, the plaintiff accepted said offer of the defendant and requested the defendant to make immediate arrangements for the furnishing of said mill work according to said offer but that thereafter the defendant wrongfully and in breach of its agreement with the plaintiff failed, neglected and refused to furnish any of said mill work for said Parish House of St. Paul's Episcopal Church according to said contract between defendant and plaintiff and the defendant wrongfully repudiated said contract; that the plaintiff was thereupon compelled to solicit other bids for said mill work and after diligent effort was able to secure a bid for the furnishing of said mill work, which bid the plaintiff ac-

cepted for the price of Sixty-eight Hundred Dollars (\$6800); that said bid was the next lowest bid other than the bid submitted by defendant and that by reason of the wrongful acts of the defendant in breach of its contract with the plaintiff as aforesaid, the plaintiff has been damaged by the defendant in the sum of Eighteen Hundred and Seventy Dollars (\$1870).

3 Wherefore the plaintiff brings this suit and claims from the defendant the sum of One Thousand Eight Hundred Seventy Dollars (\$1870), besides costs.

II. The plaintiff sues the defendant for that heretofore, to wit, on the 4th day of January, 1928, and for some time prior thereto and at all times thereafter the defendant was and still is a corporation organized and existing under and by virtue of the laws of Virginia, and having its principal place of business in Rosslyn, in the State of Virginia, and engaging regularly in business in the District of Columbia; that the plaintiff was and still is a general contractor engaged in business in the District of Columbia; that on, to wit, January 4, 1928, the plaintiff, as was well known to the defendant, was contemplating making a bid for the construction of a Parish House for St. Paul's Episcopal Church in the District of Columbia; that on said date the defendant made a written offer to the plaintiff to furnish and deliver to the plaintiff in the District of Columbia the mill work and columns, etc., for the St. Paul's Parish House, without the folding partitions, according to list then in possession of the defendant at and for the total price of \$4930.00; that at the time the defendant made said offer to the plaintiff the defendant knew, or should reasonably have known, that the plaintiff might use said offer in connection with the bid which plaintiff was contemplating making for the construction of said Parish House; that the plaintiff did use said offer in arriving at the figure on which he bid for said construction, and on, to wit, January 11, 1928, the plaintiff was awarded the contract for the construction of said Parish House for the St. Paul's Episcopal Church; that thereafter on, to wit, January 12, 1928, the plaintiff accepted said offer of the defendant and requested the defendant to make immediate arrangements for the furnishing of said mill work according to said offer but that thereafter the defendant wrong-

fully and in breach of its agreement with the plaintiff failed, neglected and refused to furnish any of said mill work for said Parish House of St. Paul's Episcopal Church according to said contract between defendant and plaintiff and the defendant wrongfully repudiated said contract; that the plaintiff was thereupon compelled to solicit other bids for said mill work and after diligent effort was able to secure a bid for the furnishing of said mill work, which bid the plaintiff accepted for the price of Sixty-eight Hundred Dollars (\$6800); that said bid was the next lowest bid other than the bid submitted by defendant and that by reason of the wrongful acts of the defendant in breach of its contract with the plaintiff as aforesaid, the plaintiff has been damaged by the defendant in the sum of Eighteen Hundred and Seventy Dollars (\$1870).

Wherefore the plaintiff brings this suit and claims from the defendant the sum of Eighteen Hundred and Seventy Dollars (\$1870), besides costs.

DOUGLAS, OBEAR & DOUGLAS,
EDMUND D. CAMPBELL,
Attorneys for Plaintiff.

5 *Plea of Defendant Murphy & Ames, Inc.*

Filed November 23, 1928.

* * * * *

Now comes the defendant Murphy & Ames, Inc., a corporation organized and existing under and by virtue of the laws of the State of Virginia, and for its plea to the first and second counts of plaintiff's declaration filed herein says: defendant admits that on or about January 4, 1928, it had knowledge of the bid contemplated by the plaintiff for the construction of a Parish House for the Saint Paul's Episcopal Church in the District of Columbia, but denies each and every other allegation set forth in the first and second counts of the plaintiff's declaration.

VANDOREN, RAFFERTY & ROGERS,
WILLIAM E. FUREY,
Attorneys for Defendant.

Memorandum.

April 30, 1931.—Trial resumed. Same Jury. Verdict for Plaintiff for \$1,870.00.

Supreme Court of the District of Columbia.

Friday, May 8, 1931.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * *

Come now the parties hereto, by their respective attorneys of record, and thereupon the motion for a new trial is argued and submitted to the Court and being considered, it is ordered that the said motion be, and the same is
6 hereby overruled and judgment on verdict ordered.

Wherefore it is considered that plaintiff recover of defendant herein the sum of Eighteen Hundred and Seventy Dollars (\$1870), with interest thereon from this date, together with costs of suit to be taxed by the clerk, and have execution thereof.

From the foregoing judgment the defendant by its attorney of record in open Court notes an appeal to the Court of Appeals of the District of Columbia; whereupon, the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars (\$100) with leave to deposit the sum of Fifty Dollars (\$50) with the clerk in lieu thereof. The maximum of an undertaking to operate as a supersedeas is hereby fixed in the sum of Twenty-five Hundred Dollars (\$2500.00).

Memoranda.

May 18, 1931.—Undertaking (Supersedeas) \$2,500.00 approved and filed.

May 28, 1931.—Proposed Bill of Exceptions and Notice filed.

Assignment of Errors.

Filed May 28, 1931.

* * * * *

7 Now comes the defendant and assigns as errors committed by the Trial Court at the trial of this cause, the following:

1. The Court erred in denying defendant's motion for a directed verdict, for that,

(a) the declaration fails to allege that the plaintiff was ready, able and/or willing to perform his part of the contract alleged, and

(b) no evidence was offered or admitted on behalf of the plaintiff that he was ready, able and/or willing to perform his part of the contract alleged, and

(c) no evidence was offered or admitted on behalf of the plaintiff to sustain the allegation contained in his declaration that the defendant had refused to perform or breached the contract alleged.

2. The Court erred in its charge to the jury, for that

(a) the charge took as uncontroverted the evidence on the issue of acceptance by the defendant of the contract alleged, notwithstanding the presence of conflicting evidence on that issue, and

(b) the charge assumed the presence of admissible evidence on the issue of a demand by the plaintiff on the defendant company to perform the contract alleged.

3. The Court erred in refusing to instruct the jury as prayed in Defendant's Instructions numbered "1".

4. The Court erred in refusing to instruct the jury as prayed in Defendant's Instructions numbered "2".

5. The Court erred in refusing to instruct the jury as prayed in Defendant's Instructions numbered "3".

6. The Court erred in refusing to instruct the jury as prayed in Defendant's Instructions numbered "4".

8 7. In other respects apparent of record.

WILLIAM E. FUREY,

PAUL V. ROGERS,

Attorneys for Defendant.

Service of a copy of the above is acknowledged this 28th day of May, 1931.

DOUGLAS, OBEAR & DOUGLAS,

Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

Wednesday, July 1, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, Joseph W. Cox, Justices, presiding.

* * * * *

Comes now the parties hereto, by their respective attorneys of record; whereupon, the Bill of Exceptions taken at the trial of this cause is submitted to the Court this 1st day of July, 1931, and thereupon is signed and made of record, *nunc pro tunc*.

Designation of Record.

Filed May 28, 1931.

* * * * *

Now comes Murphy & Ames, Inc., the appellant in the above entitled cause and designates the parts of the record which it desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

- 9 1. The Declaration.
2. The Plea.
3. Memo.—Verdict of Jury.
4. Judgment of Court on said Verdict.
5. Memo.—Appeal noted in open court.
6. Memo.—Appeal bond approved and filed.
7. The Bill of Exceptions.
8. The Assignment of Errors.
9. This Designation.

WILLIAM E. FUREY,
PAUL V. ROGERS,
Attorneys for Defendant.

Service of the copy of the above is acknowledged this 28th day of May, 1931.

DOUGLAS, OBEAR & DOUGLAS,
Attorneys for Plaintiff.

10 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 9, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this

transcript, in cause No. 76093 at Law, wherein Hugo Herfurth, Jr. is Plaintiff and Murphy & Ames, Inc., a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of August, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
By CHAS. B. COFLIN,
Assistant Clerk.

11 In the Supreme Court of the District of Columbia.

At Law.

No. 76093.

HUGO HERFURTH, JR., 1212 King Street, Alexandria,
Virginia, Plaintiff,

v.

MURPHY & AMES, INC., a Corporation, Defendant.

Bill of Exceptions.

Be it remembered that at the trial of the above-entitled cause on April 29, 1931 and on April 30, 1931, before Mr. Justice Siddons, in the Supreme Court of the District of Columbia, and a jury regularly empanelled and sworn to try the issues pending between plaintiff and defendant, the plaintiff to maintain the issues on his part joined, offered the evidence of certain witnesses as follows:

Hugo Herfurth, Jr., testified that he was plaintiff and a general building contractor, principally engaged in the District of Columbia; that in the latter part of 1927 he was interested in making a bid for the general building contract for the construction of St. Paul's Parish House in the District of Columbia; that sometime in January of 1928, before he made a bid for said general building contract, he received, by mail, the following letter unsolicited by him,

from the defendant company, which letter was offered and received in evidence as follows:

“Murphy and Ames.

January 4, 1928.

H. Herfurth, Jr.,
Washington, D. C.

12 DEAR SIR:

We will be pleased to furnish the Millwork columns etc., for St. Paul's Parish House without the folding partitions, and according to our list.

For Four thousand, nine hundred and thirty (\$4,930) Dollars.

Very truly yours,

MURPHY AND AMES.

(Signed) W. P. AMES.”

Plaintiff further testified that no “list” accompanied this letter and that upon receipt of the letter he used the price therein quoted as a basis for his millwork estimate under his general contract, and that sometime in January of 1928, he was awarded the contract for the construction of said Parish House.

After he was awarded the general construction contract, plaintiff testified that he, in company with Mr. Clark, went to the office of Murphy & Ames, Inc. in Rosslyn, and orally accepted the offer made by Murphy & Ames as set forth in its letter dated January 4, 1928; that when he accepted said offer, Mr. Ames, an officer of Murphy and Ames, Inc. at first said “fine”, that Mr. Ames then went in a back room with a Mr. Rucker and took with him plans and specifications for St. Paul's Parish house; that after about forty-five minutes Mr. Ames came out and said “they did not include the panel work, but we will see what we can do about it”; that thereafter plaintiff went back again and asked Mr. Ames to let him know immediately about the job, “that we wanted to give him the size and details of the frames for hanging stiles if they needed any. Finally I asked him were they going to do the millwork or weren't they going to do it, because I was quite sure we would soon be ready for the basement frames”; that thereafter he had no communication personally with the defendant company, but

testified that his secretary called Murphy & Ames, by telephone, on several occasions in reference to the millwork contract and that he was told by his secretary that
13 “they (Murphy & Ames, Inc.) could not do the job.”

Thereafter, plaintiff contracted with another millwork company for the furnishing of the millwork necessary for the construction of St. Paul's Parish House and paid for said millwork the sum of Six Thousand, Eight Hundred (\$6,800.00) Dollars.

On cross-examination the plaintiff testified that he understood the words in the offer “the millwork columns, etc. for St. Paul's Parish House, without folding partitions, and according to our list” included everything on the plans and specifications in the line of millwork except the folding partitions which were specifically excluded; that Murphy and Ames, Inc. had in their possession the correct plans and specifications for St. Paul's Parish House; that plaintiff at no time, either before or after the award to him of the general contract ever saw or examined the list referred to in the letter of Murphy & Ames of January 4, 1928; that he had no current account with the defendant company and never personally called on them to deliver any millwork or material for the Parish House job; but that his secretary called Murphy & Ames, by telephone, on several occasions, although he was unable to say who she talked with at Murphy & Ames, as he was not a party to the telephone conversations.

Upon redirect examination plaintiff testified that paneling is an integral part of millwork, such as panels on a door.

Thereupon the plans and specifications for the construction of St. Paul's Parish House were offered and received in evidence, a similar set of said plans and specifications having been in the possession of the defendant company at the time of its proposal to the plaintiff under date of January 4, 1928.

Charles H. Wagner, an officer of Heise & Burns, Mill and Lumber Company of Baltimore, Maryland, testified on behalf of plaintiff that his company furnished the millwork necessary in the construction of the Parish House for St. Paul's Church, without the folding partitions for the
14 price of \$6,800.00; that the price was fair and reasonable; he further testified that the particular words in

the letter of January 4, "millwork columns, etc." meant in the trade all of the mill work required by the plans and specifications. Witness was shown specifications for St. Paul's Parish House and said that the various items of millwork were found under the heading "joinery" in those specifications; he further testified that panelling was always a part of the millwork, and that it was an integral part of the millwork in this particular job.

Charles A. Clark testified that he was with the plaintiff, Hugo Herfurth, Jr. in January of 1928, when Herfurth went to the office of Murphy & Ames, Inc. in Rosslyn; that he was at that time an employee of Mr. Herfurth and that Mr. Herfurth said to Mr. Ames that he (Mr. Herfurth) was giving his millwork job for the Parish House to Murphy & Ames.

Upon cross examination, Mr. Clark testified that he had never seen the list referred to in the letter of January 4, 1928.

Sarah M. Marshall testified that she was the secretary for Mr. Herfurth in his employ in 1927 or 1928; that upon the receipt of the letter of January 4, 1928, from the defendant company, she called, by telephone, the office of the defendant company and asked whether "glazing was included in the contract." She testified that someone at Murphy & Ames said that the glazing was not included in "their estimate."

Thereupon plaintiff rested.

Thereupon to maintain the issues on his part joined, the defendant offered in evidence as follows:

William E. Ames testified that he was an officer of the defendant company; that in January of 1928 he sent, on behalf of the Company, a proposal to Hugo Herfurth, Jr., for furnishing millwork for St. Paul's Parish House in the City of Washington, District of Columbia; that at the time
15 of sending said proposal there had been prepared at the office of Murphy & Ames, an itemized list of all items of millwork which Murphy & Ames, Inc. expected or was equipped to supply; that the list so prepared was the one referred to in the letter of January 4, 1928. Whereupon, the itemized list was offered and received in evidence, there being certain items of panelling shown on the specifi .

cations not included in the list. Mr. Ames testified that the defendant company was willing, anxious and stood ready at any time to furnish the millwork material itemized in the list received in evidence, and referred to in the letter of January 4; that the defendant company was not equipped to furnish items of panelling and the same had therefore been excluded from the list. Mr. Ames further testified that Mr. Herfurth and Mr. Clark came to the office of Murphy & Ames in January of 1928, in reference to the proposal of January 4, 1928, and talked to him, but denied that Mr. Herfurth or anyone acting for him ever accepted the said proposal. The question was brought up about the panels. Mr. Herfurth and Mr. Clark were laboring under the impression that they were included, and further testified that at no time was the defendant company called upon to furnish any material for the construction of St. Paul's Parish House; he, Mr. Ames further said that after his conversation with Herfurth and Clark, Clark called him up and wanted to know what Murphy and Ames would give to be let out of its contract; that witness replied he never felt he was in a contract as Clark had "never asked us to supply the material according to our list." Witness said that if Mr. Herfurth's secretary telephoned she did not talk to him. Upon cross-examination Mr. Ames was shown the specifications for St. Paul's Parish House which had been introduced in evidence and said that in those specifications millwork came under the head of "joinery"; that unless stipulated to the contrary as in Murphy & Ames' offer when a millwork man
16 estimates on millwork he includes all millwork under the heading of joinery other than rough lumber; that both folding partitions and panelling were part of the millwork under joinery in those specifications; that although Murphy and Ames were not then equipped to do panelling, the list included certain items of panelling which the defendant expected to procure for the purpose elsewhere. Upon questioning by the court Mr. Ames testified that the list referred to had been compiled from the plans and specifications.

This being the substance of the testimony introduced in the case, the defendant moved the court to direct the jury to return a verdict for the defendant on both counts for the following reasons:

1. That the Declaration failed to set forth any allegation of readiness, willingness, and/or ability on the part of the plaintiff to perform his part of the contract, assuming for the purposes of the motion, that the defendant's proposal of January 4, 1928, had been accepted by the plaintiff.

2. That no evidence had been introduced to establish that the plaintiff was ready and willing and/or able to perform his part of the contract dated January 4, 1928, assuming for the purposes of the motion, that the same had been legally accepted by the plaintiff.

3. That the only evidence introduced by the plaintiff in support of the allegations contained in his declaration that the defendant company "had failed and refused to perform" the contract in question, was the testimony of the plaintiff that his secretary had called, by telephone, the defendant company and that someone had said, on behalf of defendant company that "they could not do the job", was pure hearsay evidence and therefore not admissible in support of said allegations.

Whereupon the Court declined to grant defendant's motion, and to this refusal of the Court, the defendant
17 duly excepted, and the exception was noted by the Court on its minutes.

Thereupon the defendant requested the Court to allow the following instructions to the jury, which said request was denied, and the denial thereof duly excepted.

Defendant's Instructions.

No. 1. The jury is instructed to return a verdict for the defendant.

Defendant's Instructions.

No. 2. The jury is instructed that the defendant in making an offer to the plaintiff had a right to prescribe in its offer any condition as to time, quantity, mode of acceptance, or other matters which it may please to insert in said offer, and the acceptance to include the agreement, must in every respect meet and correspond with the offer, neither falling short of or going beyond the terms proposed.

Defendant's Instructions.

No. 3. The jury is instructed that if they find from the evidence that the offer made by the defendant to the plain-

tiff was duly accepted by the plaintiff, then they shall consider the transaction as a cash sale, and the payment of the purchase price by the plaintiff and the delivery of the merchandise by the defendant as dependent and concurrent undertakings requiring proof by the plaintiff of his readiness and ability to perform as a basis of his right to recover any sum from the defendant.

Defendant's Instructions.

No. 4. The jury is instructed that before there can be a contract, the minds of the parties must meet honestly and fairly, without mistake or mutual misunderstanding,
18 upon all the essential points involved in the transaction composing the contract.

And thereupon next the Court charged the jury as follows:

The COURT (Mr. Justice SIDDONS): The plaintiff is claiming of defendant corporation the sum of \$1,870, a figure that is arrived at by deducting the amount of the proposal submitted by the defendant company, from the amount of the contract subsequently made by the plaintiff; that the defendant breached its obligation under its bid, and the plaintiff was compelled to call for another bid to do this same work for \$6,800. This difference the plaintiff seeks to recover from the defendant corporation, and he does so upon the claim that the defendant breached the contract, that it entered into, he says, by the written proposal submitted to him by the defendant company, and its acceptance by the plaintiff. In this case it would appear from the testimony to have been an oral acceptance of this proposal submitted by the defendant company.

Now, I do not want to review needlessly the evidence in this case, but as I recall it there was some uncontradicted testimony that the plaintiff here became a successful bidder for the construction, the whole of the construction of this Parish House to be built for the Episcopal Church, St. Paul's and he, the plaintiff, had bid on that proposed building operation and the bid was accepted.

He was awarded the contract for building this Parish House. The defendant in answering this declaration of the plaintiff, denies all of the allegations of the declaration ex-

cepting this, he says in his pleas, as he calls it, filed in answer to the declaration, "defendant admits that on or about January 4, 1928, it, the defendant corporation had knowledge of the bid of the plaintiff for the construction of a parish house for St. Paul's Episcopal Church in the District of Columbia, but denies every other allegation of the declaration."

19 The result of these two papers, the pleadings in this case, presents an issue of fact to be determined by the jury.

Now, how does this controversy arise? It seems to have arisen over what this proposal of the defendant company was. What did it mean? This whole thing, this whole controversy has arisen apparently over what was the meaning of the parties here and by the contract taking the form of a submitted proposal to the plaintiff and its acceptance.

Now, plans and specifications had been prepared which would be the guide to be followed and observed by whoever got in the first instance the contract for the building of the structure itself. To carry out the contract Mr. Herfurth had to build according to those plans and specifications, within the compass which he had to observe from the moment he began the work of construction.

Now, this paper, this proposition dated January 4 by the defendant company was received by the plaintiff as a proposal or estimate and accepted by him. This made a contract between these two parties, and the difficulty in the case is largely, if not exclusively, just what that contract was, and we have, of course, to look at the written proposition.

The plaintiff says that this does not mean at all what the defendant is insisting it meant. The plaintiff says that what he secured from this defendant was a proposition to do all of the millwork required by these plans and specifications save and except folding partitions. The plaintiffs contend that the plain meaning as he reads that contract was that the defendant company, that is, Murphy and Ames, Inc., bid for all of the millwork in this building operation described by the plans and specifications here, save and except the folding partitions. Plaintiff in the declaration excepts those folding partitions, accepting that defendant was not under any obligation whatsoever to supply folding partitions.

Now, the defendant, however, contends for a different meaning and stresses very much those concluding words in the first paragraph that has been read here "and according to our list."

If I understand aright, the contention made on behalf of the defendant here as to these words is that not only were the folding partitions excluded from the obligations of the estimate when accepted, but that in addition the offer was confined to what appears on this list. You have heard the testimony about the preparation of that list. It is uncontradicted that the defendant company had before it when this statement was prepared these very plans and specifications, and that remembering that he contemplated making a bid, it made a list of what was involved from its point of view in any proposal that it made.

The defendant's position is that this proposal not only excepted the folding partitions, but was restricted as well by what appeared on the list that the defendant had made from the plans and specifications. Now, it is conceivable that the list might further restrict what the defendant was intending to submit as a part of this proposal. You have heard the evidence relating to the subject. Here the difficulty would seem to be that these parties find themselves in controversy, because each of them has construed the language of the paper differently, and in probably what might be said vital particulars. Now, in a case of the kind when controversy arises in court, evidence is received and submitted to a jury as to what the parties ought to understand from the meaning of the contract. If a contract is clear and there is no ambiguity, no obscurity in it, the parties would not be permitted to go into any such question. It is only when there is something of an ambiguity, something susceptible of different meanings, or an obscurity, so that the parties differ as to what the language means. In all these cases where language appears in the written contract that is either ambiguous or obscure, evidence will be admitted and issues made in the case as to what ought the parties to have understood the meaning of the contract to be. If it were purely a matter of construction of the contract the jury would have nothing to do with that. The court will consider the language that is simple and plain and admits of no ambiguity or obscurity. The

Court will consider or construe that contract when a question of its construction arises, not the jury. Specifications have been put in evidence, and your attention has been called to them and there is no dispute between the parties that the millwork to be purchased was to be found at the top of the specification which is headed "joinery." That is where they were, both of them for that matter, to find what those plans and those specifications required with respect to the millwork. Now, the plaintiff says, looking at those specifications and those plans, the meaning is plain as to what is included in the millwork; and, says the plaintiff, this defendant submitted this bid upon those plans and specifications, and looking to the type of joinery in there found what the specifications and plans required. The plaintiff says that the defendant's proposal was to supply all that is required by the plans and specifications under the title of millwork, save those folding partitions. You have heard the evidence that comes from the defendant on that count. What is the truth of the matter? You shall find from the evidence in this case if the defendant company undertook to furnish under this estimate and proposal, accepted as a proposal, all of the millwork required under those plans and specifications, save and except those folding partitions, and that the defendant company failed to do it,—failed to carry out that contract,—and thereby requiring this plaintiff, to seek elsewhere for the millwork that he was not able to obtain from the defendant.

The language is "We will be pleased to furnish the millwork columns etc. for St. Paul's Parish House without the folding partitions." Up to that point there is no
22 punctuation. Then comes a period. And then the words "and according to our list". The meaning is what you are concerned with here. Does it mean that this bid thus submitted to furnish the millwork columns for this house was in accordance with this list or was it, as the defendant says, that the plaintiff is bound to know or inquire as to what was on that list. You remember what the president of the defendant company, Ames, testified to yesterday, he said that what they really meant to say by this was, that we will furnish the millwork columns, "according to our list." There is no evidence here that plaintiff saw that list, and from his contention here no reason, from his read-

ing of the contract, why he should even have inquired about it.

I have granted an instruction at the instance of the plaintiff which I will read to you:

The jury are instructed as a matter of law that as the proposal of the defendant was prepared by the defendant, they are to adopt such a construction as is most favorable to the plaintiff and most unfavorable to the defendant for the reason that the said proposal having been so prepared is to be construed most strongly against the person preparing it.

That rule of law is a just rule of law to remember that this proposal was prepared by the defendant company. The plaintiff had no hand in its preparation but received it and accepted it.

Now, weighing the testimony that is before you, you must be guided by that principle of law as to what part it will play in your determination of the conflicting evidence here as to the meaning that these parties, respectively put on the defendant's proposal.

The burden of proof is upon the plaintiff to establish its case, as you know. I think I have otherwise covered all of the vital questions here. Before you leave your seats let each of the counsel arise and reserve their exceptions
23 to the charge.

Mr. Furey: In order of occurrence, if your Honor will permit me, I object to so much of the charge as takes the evidence of this case as uncontroverted so far as the acceptance of this defendant's proposal, is concerned. My understanding of the facts is that Mr. Ames, the only witness for the defendant, testified that nothing was ever said by Mr. Herfurth or anyone on his behalf that he accepted the proposal. I object to so much of the charge as is predicated upon any evidence of a demand by the plaintiff of the defendant company to furnish any millwork or other materials for the reasons that there is no admissible evidence of identification of the parties with whom the secretary of the plaintiff had a telephone conversation. Recognizing, of course, the presumption in favor of identification, where the conversation has been actually denied by the defendant, the burden of procedure shifts back to the plaintiff to clearly identify with whom the conversation was had.

Whereupon the Court overruled the objection so taken, and to such ruling the defendant duly excepted.

Whereupon the jury retired to consider their verdict, and returned with a verdict in favor of the plaintiff in the sum of One Thousand Eight Hundred and Seventy (\$1,870) Dollars.

The foregoing, being the substance of all the testimony bearing upon the exceptions herein reserved on behalf of defendant, and as all of said exceptions were duly noted and slowed, as aforesaid and duly entered upon the minutes of the Court, before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendant may have his case reviewed on appeal, the defendant, by its attorneys, moves the Court to sign and seal, this, his Bill of Exceptions, to have the

24 same force and effect as if each and everyone of said exceptions had been separately signed and sealed, which motion is granted by the Court; and thereupon the defendant tenders this, his bill of exceptions and requests the Court to sign and seal the same.

Whereupon it appearing to Mr. Justice Bailey, that Mr. Justice Siddons, the judge before whom this cause was tried, is by reason of death unable to allow and sign this bill of exceptions, now therefore, Mr. Justice Bailey being a judge of the court in which the cause was tried, is satisfied that this is a true bill of exceptions, and accordingly signs and seals the same, now for then, this 1st day of July A. D. 1931.

JENNINGS BAILEY,

Justice.

Approved:

PAUL V. ROGERS,

WILLIAM E. FUREY,

Attorneys for Defendant.

DOUGLAS, OBEAR & DOUGLAS,

By EDMUND D. CAMPBELL,

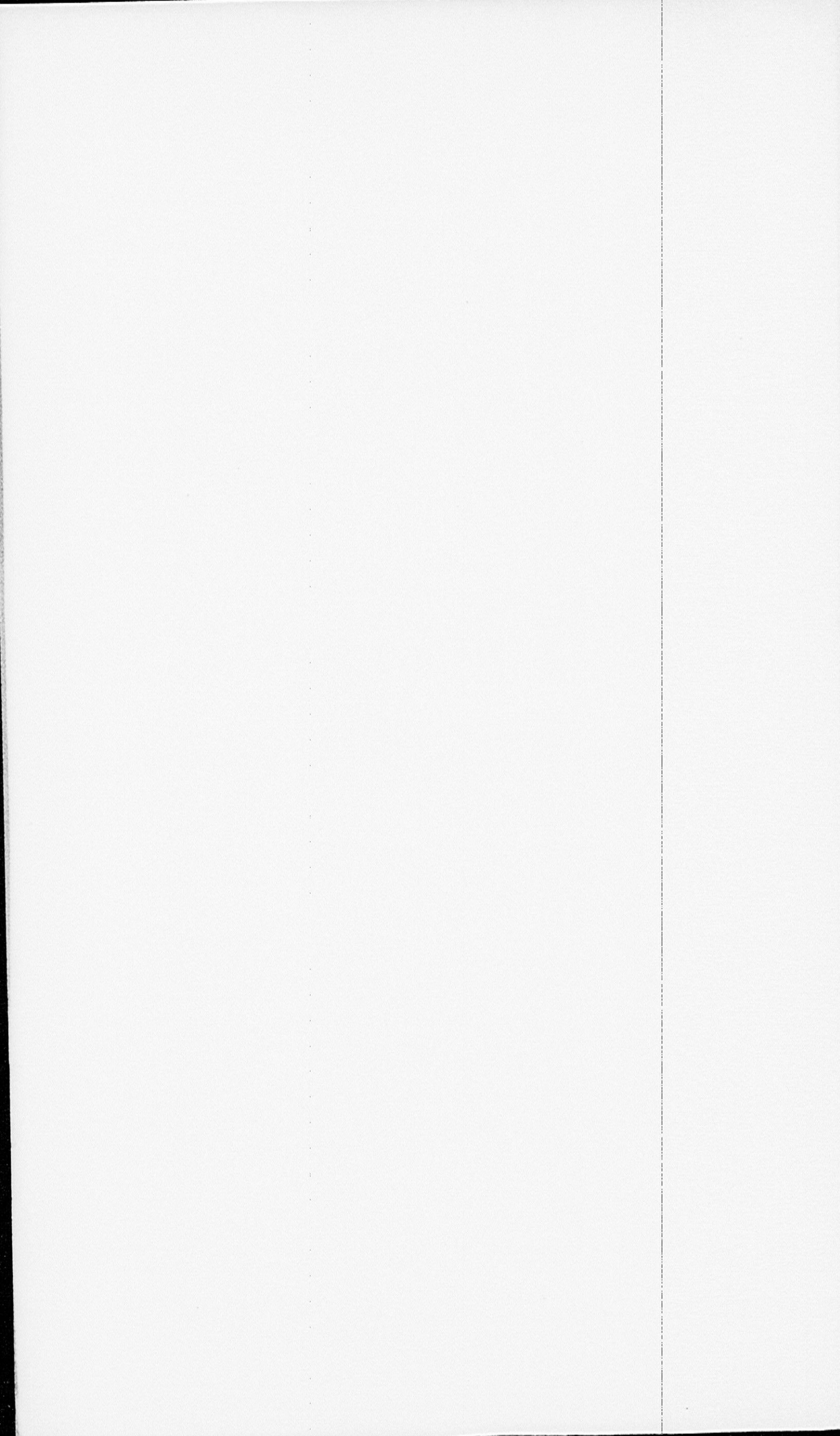
Attorneys for Plaintiff.

25 [Endorsed:] At Law. No. 76093. Hugo Herfurth, Jr., Plaintiff, v. Murphy & Ames, Inc., Defendant. Bill of Exceptions. M. 84, p. 180. Law

offices of William E. Furey, Southern Building, Washington, D. C. Court of Appeals, District of Columbia. Filed Aug. 20, 1931. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5474. Murphy & Ames, Inc., a corporation, vs. Hugo Herfurth, Jr. Court of Appeals, District of Columbia. Filed Aug. 20, 1931. Henry W. Hodges, Clerk.

(1036)



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 4 - 1931

Henry W. Hodges

CLERK

IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1931.

No. 5474.

MURPHY & AMES, INC., a Corporation, *Appellant*,

vs.

HUGO HERFURTH, JR.

BRIEF FOR APPELLANT.

PAUL V. ROGERS,
WILLIAM E. FUREY,
Attorneys for Appellant.



IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1931.

No. 5474.

MURPHY & AMES, INC., a Corporation, *Appellant*,

vs.

HUGO HERFURTH, JR.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The appellee, plaintiff in the court below, sued the appellant, defendant below, for damages alleged to have been sustained by virtue of the breach of a certain contract for the furnishing of building materials. (For purposes of convenience the parties are herein designated as "plaintiff" and "defendant".)

Plaintiff, by his declaration (Rec. p. 1) alleges that in the year 1928 he was engaged in general construction work, and at the time of the matters in contro-

versy, was interested in making a bid for the general construction contract for the erection in the District of Columbia of a parish house for St. Paul's Episcopal Church; that defendant offered in writing to furnish the millwork and columns required for the work in question for the sum of \$4,930; that he relied upon this figure in making his bid and was awarded the construction contract. Plaintiff further alleged that after the award he accepted the offer made by defendant but that defendant failed and refused to perform, and that by so doing, plaintiff was required to procure the materials covered by the offer elsewhere at an increased price, sustaining thereby a loss of \$1,870, the sum claimed as damages.

To this declaration defendant filed its plea (Rec. p. 4) admitting therein knowledge of plaintiff's interest in bidding for the construction work, but otherwise denying all other allegations of the declaration.

At the trial of the cause it was established that plaintiff received from defendant, a lumber and millwork supply house, the following letter, prior to making his bid for the construction work:

"Murphy and Ames

January 4, 1928.

H. Herfurth, Jr.,
Washington, D. C.

Dear Sir:

We will be pleased to furnish the Millwork columns etc., for St. Paul's Parish House without the folding partitions. and according to our list.

For Four thousand, nine hundred and thirty (\$4,930) Dollars.

Very truly yours,

MURPHY AND AMES,

(Signed) W. P. AMES."

This letter was sent to plaintiff, unsolicited by him, and he relied upon the same in making his contract bid. The construction contract was awarded to plaintiff.

Plaintiff testified (Rec. p. 9) that after the contract award he went to the office of the defendant company and orally accepted the offer contained in the foregoing letter; that he had never seen the list referred to in the letter, that he had no current account with the defendant company (Rec. p. 10) and that he had never personally called upon the defendant company to deliver any materials, but was "told" (Rec. p. 10) by his secretary that defendant company "could not do the job."

William P. Ames, an officer of the defendant company, testified that at the time the letter was sent to plaintiff an itemized list of the materials which defendant company expected or was equipped to supply (Rec. pp. 11, 12) had been prepared. This list was received in evidence. Witness denied that plaintiff had ever accepted the offer contained in defendant's letter, and testified that defendant company had never been called upon to supply any materials under said letter. (Rec. p. 12.)

The sum claimed by plaintiff was established as the difference between the amount stated in defendant's letter and the sum which he was required to pay for millwork and columns in carrying out his construction contract.

At the close of defendant's case a motion was made by defendant for a directed verdict which was denied. (Rec. p. 13.) Requests were made by defendant for certain instructions to the jury which were also denied (Rec. p. 13). Certain exceptions were taken by

defendant to the Court's charge to the jury (Rec. p. 18).

From a judgment entered upon a verdict in favor of plaintiff this appeal is taken.

ARGUMENT.

Assignments of Error Nos. 1 and 3—Refusal to Grant Motion for Directed Verdict.

Counsel for defendant respectfully submit that the lower court erred in denying defendant's motion for a directed verdict (Rec. p. 12) and in refusing to so instruct the jury (Rec. p. 13). The failure of plaintiff to allege and prove his readiness, ability and willingness to perform his part of the alleged contract was a fatal omission and proper ground for a directed verdict in favor of defendant.

a. Necessity for allegation and proof of plaintiff of his readiness and ability to perform his part of the alleged contract.

Admitting for the purposes of argument a binding acceptance, the contract in question is an executory agreement for the sale of certain building materials. The subject matter is described, the price fixed, but the time and manner of payment is left silent. This contract, when considered in the light of the testimony of plaintiff (Rec. p. 10) that he had no current account with defendant company, admits of but one construction, namely, that the transaction was on a cash basis. The authorities are uniform in holding that where nothing is said between the parties as to the time of payment, the transaction is understood to

be a cash sale, and that payment and delivery are immediate and concurrent acts.

Leonard v. Davis, 1 Black 476, 17 U. S. (L. ed.) 222.

Audenried v. Randall, Fed. Cas. No. 644 (3 Cliff 99).

Inner Shoe Tire Co. v. Treadway, 286 Fed. 838.

Simmons v. Green, 35 Ohio State 104.

Bollenbacher v. Reid, 118 N. W. 933, 155 Mich. 277.

Miner Lithographing Co. v. Mittenthal Bros., 119 N. Y. S. 1066.

Bogert Flour Co. v. Klein, 166 N. Y. S. 766.

Metz. v. Albrecht, 52 Ill. 491.

Bollman v. Burt, 61 Md. 415.

Plaintiff, having no current account with the defendant company, could not insist on credit nor could he require a delivery of the materials without concurrently making payment therefor. The contract in question, being executory in nature and binding the parties to the performance of mutually dependent and concurrent acts, cannot be enforced by either party without an allegation and proof of the readiness and ability to perform by the party seeking relief thereunder.

Bank of Columbia v. Hagner, 1 Pet. 455, 7 U. S. (L. ed.) 219, 223.

Newman v. Baker, 10 App. D. C. 187, 202.

Campbell v. Moran Bros. Co., 97 Fed. 477.

Porter v. Rose, 12 Johnson 208 (N. Y.) 7 Am. D. 306.

Isaacs v. N. Y. Plaster Works, 67 N. Y. 125.

Reid v. America Co., 136 N. Y. S. 75.
Hough v. Rawson, 17 Ill. 588.
Grandy v. McCleese, 2 Jones' Law 142, 64
 Am. D. 574, 576.
Hawley v. Mason, 9 Dana 32 (Ky.), 33 Am. D.
 522.
McGehee v. Hill, 4 Porter 170, 29 Am. D. 277.
Beard v. Sloan, 30 Ind. 279.
Smith v. Smith, 8 Blackf. 208.

The early case of *Grandy vs. McCleese*, *supra*, is an excellent illustration of the application of the rule of law relied upon in the present case. There, an action in assumpsit was brought by the buyer against the seller for non-delivery of a quantity of corn. The existence of a contract was denied by the seller. It was said by the Court (page 576):

"The contract proved by the testimony was simply an executory one for the sale of a quantity of corn at a stipulated price. The legal effect of it was to bind the parties to the performance of concurrent acts. The plaintiff was to send for the corn and pay for it upon delivery, and the defendant was to deliver it upon receiving payment. Neither party could demand performance by the other without the allegation and proof of his own readiness and ability to perform his part of the agreement * * *.

It is contended by counsel that the denial of the contract by the defendant was a breach of it, and dispensed with the proof on the part of the plaintiff that he had paid or tendered the money, or had it ready to be paid or tendered at the time when he demanded the corn; and such was the charge of his honor to the jury in the court below. We do not concur in that opinion in the extent to which it is carried; we admit that the

conduct of the defendant dispensed with the obligation on the part of the plaintiff to pay the money, or ever tender it; but it did not relieve him from the necessity of having it ready to be paid or tendered. Until he had provided the means to pay for the corn upon delivery, he had not put himself in a situation in which he had a right to demand it."

And in the leading case of *Bank of Columbia v. Hagner*, *supra*, decided by the Supreme Court of the United States, it was said by the Court (page 223, L. ed.):

"Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract are to be considered independent, or dependent, yet it is evident the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor, or a vendee wish to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof."

In the case of *Hawley vs. Mason*, *supra*, the court gave as the reason for the rule that the default on the part of the defendant constitutes no wrong or

injury to the plaintiff unless he (the plaintiff) is prepared to perform his part of the contract.

In Porter vs. Rose, *supra*, it was said by the Court (page 308 7 Am. D.):

“That where two acts are to be done at the same time, as when the one agrees to sell and deliver, and the other agrees to receive and pay, an averment by the purchaser, in case he sues for the non-delivery, of a readiness and willingness to pay is indispensably necessary.”

In the recent case of Reid v. America Company, *supra*, in an action by the buyer of a motor car, it appeared by uncontradicted evidence that the seller did not have the car at the time fixed for delivery; the Court held that such failure excused buyer from tendering the price agreed upon, but did not excuse a failure to aver and prove readiness to pay for the car.

Counsel respectfully submit that the declaration filed in the present case (Rec. p. 1) wholly fails to aver readiness and/or ability on the part of plaintiff to perform his part of the alleged contract, and further, that no evidence was adduced at the trial of the cause to supply this omission (Rec. p. 12). Necessarily there can be no application of the rule of intendment of verdict. Here a fundamental defect exists by reason of the omission to state matters essential to plaintiff's cause of action and objection was properly made by motion for a directed verdict. We submit, therefore, that the lower court erred in denying defendant's motion.

Assignment of Error No. 2—Charge to the Jury.

At the conclusion of the general charge to the jury, counsel for defendant duly excepted to so much thereof as removed from the jury the issue of acceptance by plaintiff of defendant's offer. (Rec. p. 18.)

Defendant by its plea denied that plaintiff had accepted the proposal made by it. (Rec. p. 4.) At the trial of the cause Mr. William P. Ames, the only witness who testified on behalf of defendant, denied that the offer had ever been accepted by plaintiff. (Rec. p. 12.)

Notwithstanding the presence of directly conflicting evidence upon the issue of acceptance the lower court made the following statements in its charge, namely:

“In this case it would appear from the testimony to have been an oral acceptance of this proposal submitted by the defendant company.” (Rec. p. 14, par. 2.)

“Now, this paper, this proposition dated January 4 by the defendant company was received by the plaintiff as a proposal or estimate and accepted by him. This made a contract between these two parties, and the difficulty in the case is largely, if not exclusively, just what that contract was, and we have, of course, to look at the written proposition.” (Rec. p. 15, par. 2.)

“That rule of law is a just rule of law to remember that this proposal was prepared by the defendant company. The plaintiff had no hand in its preparation but received it and accepted it.” (Rec. p. 18, par. 3)

The positive language of the lower court in declaring, as a matter of fact, that plaintiff had accepted

the offer made by defendant, was prejudicial to the rights of the defendant, and in the light of conflicting evidence, unjustifiable.

Assignments of Error Nos. 4, 5 and 6—Refusal of Lower Court to Give Requested Instructions.

Defendant requested, and the Court refused, the following prayers numbered 2, 3 and 4, to which action exception was noted. (Rec. pp. 13, 14.)

DEFENDANT'S INSTRUCTIONS.

- No. 2 The jury is instructed that the defendant in making an offer to the plaintiff had a right to prescribe in its offer any condition as to time, quantity, mode of acceptance, or other matters which it may please to insert in said offer, and the acceptance to include the agreement, must in every respect meet and correspond with the offer, neither falling short of or going beyond the terms proposed.
- No. 3 The jury is instructed that if they find from the evidence that the offer made by the defendant to the plaintiff was duly accepted by the plaintiff, then they shall consider the transaction as a cash sale, and the payment of the purchase price by the plaintiff and the delivery of the merchandise by the defendant as dependent and concurrent undertakings requiring proof by the plaintiff of his readiness and ability to perform as a basis of his right to recover any sum from the defendant.
- No. 4 The jury is instructed that before there can be a contract, the minds of the parties must meet honestly and fairly, without mistake or mutual misunderstanding, upon all the essential points involved in the transaction composing the contract.

Counsel respectfully submit that the lower court denied to the defendant a fair and adequate charge to the jury upon the issues joined. An analysis of the Court's charge clearly shows that the treatment of the matters in controversy was limited to the question of construction of defendant's letter. The necessity in law for an acceptance by plaintiff of defendant's offer was not presented to the jury, but to the contrary, as has been hereinbefore shown, the Court directed a finding of fact upon the issue of acceptance in the face of directly conflicting evidence. When the refusal to grant the foregoing prayers is considered in connection with the limited charge of the trial court upon the issues involved, it is evident that the defendant did not receive a fair instruction as to the law governing their finding.

It is respectfully submitted that the requested instructions correctly state the law, were justified by the issues and evidence, were not covered by the general charge, and should have been granted.

CONCLUSION.

Counsel respectfully submit that the present appeal presents a question of vital importance both to the defendant and to persons and firms engaged in the supplying of materials generally. The natural presumption to be drawn from the failure to allege an essential matter is that the pleader cannot truthfully so allege. Here, plaintiff neither alleged nor proved that he was ready or able to perform his part of the alleged contract with the defendant company. Without right of credit from the defendant company, plaintiff orally accepted an offer that by settled law called for a cash performance by him. Having ac-

cepted orally he could not be charged with performance for the contract was within the Statute of Frauds, (Sec. 1119 D. C. Code 1924) yet he is permitted to prevail against the defendant company without either alleging or proving his readiness or ability to perform his part of the bargain. For ought that may appear, the plaintiff may have been hopelessly insolvent at the time when delivery of the material was to be made. Certainly no default on the part of the defendant company could damage plaintiff unless he was prepared to perform his part of the contract.

It is, therefore, respectfully submitted that the judgment entered should be reversed and entered for defendant.

PAUL V. ROGERS,
WILLIAM E. FUREY,
Attorneys for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 28 1931

Henry W. Hodges

CLERK

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1931.

No. 5474

MURPHY & AMES, INC., A CORPORATION, APPELLANT,

vs.

HUGO HERFURTH, JR.

BRIEF FOR APPELLEE.

CHAS. A. DOUGLAS,
EDMUND D. CAMPBELL,
Attorneys for Appellee.

IN THE
Court of Appeals, District of Columbia.

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No. 5474

MURPHY & AMES, INC., A CORPORATION, APPELLANT,

vs.

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BRIEF FOR APPELLEE.

Statement of Facts.

The statement of facts as set out by counsel for appellant at the outset of their brief is substantially correct. Counsel for appellee will call attention to certain portions of the testimony which were not covered by appellant, in connection with the argument.

ARGUMENT.**I.****THE COURT PROPERLY REFUSED TO GRANT
DEFENDANT'S MOTION FOR DIRECTED
VERDICT.**

The defendant maintains that the lower court erred in refusing to direct a verdict for the defendant at the close of the defendant's case, on the alleged ground that the plaintiff had not tendered himself ready and willing to perform his part of the contract. It is submitted that the Court properly overruled defendant's motion for the following reasons:

A. Plaintiff in legal effect did aver and prove that he was ready and willing to perform under the contract.

It is the settled law that on a motion by the defendant for a directed verdict every reasonable inference deducible from plaintiff's evidence must be given in favor of the plaintiff. As was said by this Court in the case of *City & S. Railway v. Cooper*, 32 App. D. C. 550, 555:

“On such a motion, every fact offered in evidence by the plaintiff must be accepted as true, together with every reasonable inference deducible therefrom. And the motion can only be granted when but one conclusion therefrom can be reached by all fairminded men, and that conclusion is utterly opposed to the plaintiff's right to recover in the case.”

And in the case of *Shinn v. Evans*, 37 App. D. C. 304, 309, this Court said:

“The Court is never justified in directing a verdict except in cases where, conceding the truthfulness of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict.”

In plaintiff's declaration it was alleged that “the plaintiff accepted said offer of defendant and requested the defendant to make immediate arrangements for the furnishing of said millwork according to said offer.” It is submitted that when these words are construed, not against the plaintiff, as is the usual rule of pleading, *but in favor of the plaintiff* as is the rule on motion for directed verdict, the reasonable inference therefrom is that the plaintiff was and is ready and willing to perform.

But even if the declaration were deficient in respect to the allegations which defendant claims were necessary, the defects were cured by testimony offered at the trial which was admitted without objection on the part of the defendant.

We find that Mr. Herfurth, the plaintiff, testified:

“That he, in company with Mr. Clark, went to the office of Murphy & Ames, Inc., in Rosslyn, and orally accepted the offer made by Murphy & Ames, as set forth in its letter dated January 4, 1928 (R. p. 9).

“* * * That thereafter plaintiff went back again and asked Mr. Ames to let him know im-

mediately about the job 'that he wanted to give him the size and details of the frames for hanging stiles if they needed any' '' (R. p. 9).

And again:

“ ‘Finally I asked him were they going to do the millwork or weren't they going to do it because I was quite sure we would soon be ready for the basement frames’ .”

The only reasonable inference to be drawn from the foregoing testimony (and every reasonable inference must be resolved in favor of the plaintiff) is that the plaintiff averred himself ready and willing to perform and carry out the contract. Mr. Herfurth's statement that he went to the office of the defendant to give Mr. Ames "the size and details of the frames for hanging stiles" is a distinct averment of an act of performance under the contract.

B. No averment of plaintiff's readiness and willingness to perform was necessary in this case.

Counsel for appellant have cited certain authorities in support of their contention that it was necessary for plaintiff formally to aver and prove readiness and willingness to perform under the contract. These cases, however, without exception relate solely to instances where there is an ordinary cash sale of merchandise with concurrent obligation upon buyer and seller.

The situation in the instant case is entirely different. Under the contract between Mr. Herfurth and Murphy

& Ames, Inc., the latter was to furnish millwork, which necessitated the milling and manufacture of doors, window frames, etc., according to certain plans and specifications which had been submitted. The *manufacture* of this millwork by Murphy & Ames, Inc., was a condition precedent to its right to demand payment of the purchase price from the plaintiff. As has been heretofore said the plaintiff attempted to give the defendant the size and details of the frames for hanging stiles (R. p. 9), i. e. details necessary or desirable for the defendant in its manufacture of the millwork.

In such a case this Court has held, in accordance with the great weight of authority, that where the plaintiff's action is based, as here, on alleged repudiation of the contract by the defendant, the defendant cannot be heard to complain that the plaintiff has failed to aver and prove readiness and willingness on his part to perform.

In the case of *Molloy v. Kellogg*, 51 App. D. C. 302, plaintiffs sought recovery from the defendant of \$510 alleged to represent loss sustained upon the sale on open market of twenty barrels of oil which defendant had contracted to purchase but had not accepted in accordance with the terms of the contract. In the declaration it was averred that deliveries of five-barrel lots were to be made between the months of April and September upon the buyer furnishing shipping instructions to the plaintiffs. The declaration averred readiness and willingness to make deliveries.

In the affidavit of defense, defendant, although admitting that he had not given shipping instructions,

alleged that the plaintiffs were not ready and willing to make the deliveries called for under the contract. This Court affirmed a decision of the lower court which held that the affidavit of defense was insufficient, *in that it constituted no defense to plaintiffs' action to state that plaintiffs were not ready and willing to perform.* This Court, in its opinion, said:

“Having failed to furnish plaintiffs shipping instructions, as required by the contract, defendant is not in a position to question the ability of plaintiffs to fulfill their part of the contract, and hence the averment that plaintiffs were not ready and willing to fulfill the terms of the contract constitutes no defense. The defendant's failure to give shipping instructions effected a breach of the contract and he cannot now be heard to say that the plaintiffs could not or would not have performed their part of it.”

Molloy v. Kellogg, 51 App. D. C. 302, 304.

See also *Gray v. Smith*, 83 Fed. 824, 829, where the Circuit Court of Appeals for the Ninth Circuit said:

“It is true that where the vendor of property, before the arrival of the time for the completion of his contract of sale or conveyance, disables himself from performing by disposing of the property to another, the purchaser may at once bring his action, and he need not aver or prove tender of the purchase money on his part, nor his ability to carry out the contract; and, where either party to a contract gives notice to the other that he will not comply with its terms, the other is excused from averring or proving a tender of performance.”

See also *Robb v. Crawford*, 56 App. D. C. 394, 396, in which this Court held that the defendant in a contract for the exchange of real property, having placed his refusal to perform the contract on the ground that he was not going to pay a commission waived any objection based on lack of tender.

C. The objection, if any, is highly technical and was waived by defendant on its failure to demur and by its introduction of evidence at the trial.

The courts have held repeatedly that where a defendant introduces testimony after the court has overruled a motion for directed verdict made at close of plaintiff's case, he waives objections based on insufficiency of plaintiff's proof.

Picard v. Smith, 59 App. D. C. 291.

Washington Utilities Co. v. Wadley, 44 App. D. C. 176.

Defendant's action in the instant case is highly capricious, as its objection if any was of such a character that it could and properly should have been raised by demurrer.

“Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the

verdict, such defect, imperfection or omission is cured by the verdict, by the common law; or, in the phrase often used upon the occasion, such defect is not *any jeofail after verdict.*”

Schwartz v. Reesch, 2 D. C. App. 440, 447.

The defendant having failed to raise by demurrer its objection to the sufficiency of plaintiff's declaration, and having waited until the close of all the evidence, should not be permitted to raise at that time an objection of the captious and technical nature upon which he now seeks a reversal of the judgment of the lower court.

II.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

The claim is made by defendant's counsel that defendant was prejudiced by the court having removed from the jury the issue of acceptance by plaintiff of defendant's offer. That no prejudice could have been suffered by the defendant in this regard is evident from the following:

A. There was admittedly an offer and an acceptance, and the only issue in the case was whether or not the minds of plaintiff and defendant legally met on offer and acceptance.

As was stated by the court in its instructions to the jury (R. p. 15) “The difficulty in the case is largely, if not exclusively, just what that contract was.”

It was contended by the plaintiff that by the terms of the defendant's offer the defendant proposed to furnish all the millwork and columns for St. Paul's Parish House, in accordance with plans and specifications for said building in the hands of the defendant, with the *sole exception of the folding partitions*, which were specifically excluded from the proposal. The defendant on the other hand while admitting the making of the offer and admitting that it "was willing, anxious and stood ready at any time to furnish the millwork material itemized in the list received in evidence and referred to in the letter of January 4th" (R. p. 12), contended that it was only required under its proposal to furnish such millwork and columns as it had listed on the list in its possession.

The testimony is undisputed that plaintiff, after receiving the defendant's offer and after having been awarded the general contract for building St. Paul's Parish House, went to the office of the defendant, with Mr. Clark, to talk about an acceptance of this offer (R. pp. 10 and 11). Mr. Herfurth and Mr. Clark, his employee, testified that they thereupon accepted the offer (R. pp. 9, 11). Mr. Herfurth said that after he told Mr. Ames of the acceptance of his offer Mr. Ames said "they did not include the panel work, but we will see what we can do about it." It was admitted by Mr. Ames that both "panelling" and the "folding partitions" (the latter having been specifically excluded from the proposal, but nothing having been said about the former) were part of the millwork for the St. Paul's Parish House, as the term was commonly understood among millwork men (R. p. 12).

Mr. Ames said that "Mr. Herfurth and Mr. Clark were laboring under the impression that they (i. e. panelling) were included" (R. p. 12). He also admitted "that the defendant company was willing and stood ready at any time to furnish the millwork material itemized in the list received in evidence" (R. p. 12). This list did not include all the panelling, although it admittedly included certain items of panels which Mr. Ames testified the defendant was not equipped to manufacture but expected to procure elsewhere (R. p. 12). Possibly the most significant part of Mr. Ames' testimony in this connection is the following:

"Mr. Ames further said that after his conversation with Herfurth and Clark, Clark called him up and wanted to know what Murphy & Ames would give to be let out of its contract; that witness replied he never felt he was in a contract as Clark had 'never asked us to supply the material according to our list' " (R. p. 12).

From the foregoing it is apparent that Mr. Ames' reason for saying there was no acceptance of his proposal was that *he felt that the plaintiff's acceptance did not conform to his idea of what the defendant had proposed*. Mr. Ames construed his offer, as a matter of law, to exclude all items of panelling which were not shown on his "list," for as he said, "Mr. Herfurth and Mr. Clark were laboring under the impression that they were included."

The trial court was of the opinion that the wording of the contract was ambiguous on the point in issue, received evidence as to what was meant "in the trade"

by the use of certain of the words mentioned in the letter, and submitted to the jury the issue "as to what the parties ought to understand from the meaning of the contract" (R. p. 16). No exception was taken by the defendant to this ruling of the court, and the propriety of the submission of this matter to the jury is, therefore, not before the Court of Appeals.

In view of the testimony as it was adduced at the trial and as it has been referred to above, the trial court was certainly correct in stating that "this whole controversy has arisen apparently over what was the meaning of the parties here and by the contract taking the form of a submitted proposal and its acceptance" (R. p. 15). This was the only real issue in the case, and counsel for appellee submit that the court's instructions read in their entirety presented the case on the testimony fairly before the jury.

There can be no error in the refusal of the court to grant the defendant's prayers numbered 2, 3 and 4. The prayers as drafted by the defendant would have been very misleading to the jury had they been granted in the form proposed.

Conclusion.

It is respectfully submitted that the judgment of the lower court was properly entered against the defendant, and that this judgment should be affirmed.

CHAS. A. DOUGLAS,
EDMUND D. CAMPBELL,
Attorneys for Appellee.